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2016 DEC 30 P 1:50

Court S. Rich AZ Bar No. 021290
Rose Law Group pc
7144 E. Stetson Drive, Suite 300
Scottsdale, Arizona 85251
Email: CRich@RoseLawGroup.com
Direct: (480) 505-3937
Attorney for Energy Freedom Coalition of America

BEFORE THE ARIZONA CORPORATION COMMISSION

DOUG LITTLE
CHAIRMAN

BOB STUMP
COMMISSIONER

BOB BURNS
COMMISSIONER

TOM FORESE
COMMISSIONER

ANDY TOBIN
COMMISSIONER

**IN THE MATTER OF THE
APPLICATION OF ARIZONA PUBLIC
SERVICE COMPANY FOR A
HEARING TO DETERMINE THE FAIR
VALUE OF THE UTILITY PROPERTY
OF THE COMPANY FOR
RATEMAKING PURPOSES, TO FIX A
JUST AND REASONABLE RATE OF
RETURN THEREON, TO APPROVE
RATE SCHEDULES DESIGNED TO
DEVELOP SUCH RETURN.**

DOCKET NO. E-01345A-16-0036

DOCKET NO. E-01345A-16-0123

**IN THE MATTER OF FUEL AND
PURCHASED POWER
PROCUREMENT AUDITS FOR
ARIZONA PUBLIC SERVICE
COMPANY.**

**ENERGY FREEDOM COALITION
OF AMERICA'S SUR RESPONSE TO
THE MOTION TO COMPEL FILED
BY ARIZONA PUBLIC SERVICE**

Because Arizona Public Service (the "Company") continues to mislead the Commission, raises new issues, rewrites its Data Requests in its Reply, and persists with irrelevant and harassing requests to Energy Freedom Coalition of America ("EFCA"), EFCA is forced to file this Sur-Response to the Company's Motion for to Compel.

In an apparent concession that EFCA did answer several of the data requests previously the subject of the Motion to Compel, the Company now narrows the Motion to four requests, each will be addressed separately.

Arizona Corporation Commission

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1 **EFCA FULLY RESPONDED TO THE COMPANY'S DATA REQUEST 1.1(A).**

2 As stated previously, EFCA submitted responsive information to the Company's Data
3 Request 1.1(a) on November 18, 2016 and November 29, 2016. The original request asked EFCA
4 to "Describe EFCA's business, including its purpose, its source of funding and what EFCA does
5 or seeks to accomplish in relation to the interests of its members and managers." The requested
6 information was provided. Now the Company seeks to change its Data Request by asking¹ how
7 funding is allocated among the members. A Motion to Compel is not the proper time or place to
8 expand the data requests. And while the Company has propounded a subsequent data request
9 asking more questions about funding, that subsequent data request is not the subjection of this
10 Motion to Compel. The Company's Motion to Compel related to Data Request 1.1(a) should be
11 denied.

12 **EFCA FULLY RESPONDED TO THE COMPANY'S DATA REQUEST 1.1(B)**

13 Just as it does in Data Request 1.1(a), the Company, for the first time, seeks information
14 not requested in its data request. Originally, Data Request 1.1(b) sought "a list of EFCA's members
15 and members of its Board of Directors or other governing board or decision-making body." EFCA
16 responded with a list of its members (a list that was previously provided in its Application for
17 Intervention) and indicated EFCA had no board of directors but that all decisions are made by its
18 members. In its Reply, for the first time, the Company raises questions about specific individuals.²
19 Had these questions been raised previously, they could have been evaluated. A Motion to Compel,
20 much less a Reply in support thereof, is not an appropriate vehicle for raising new issues and asking
21 never before asked questions.

22 If the Company has specific questions, it should ask those questions. EFCA is unable to
23 correctly guess what the Company really sought. The Company's Motion to Compel related to
24 Data Request 1.1(b) should be denied.

25 ¹ Interestingly, the Company did not clarify in the personal consultation that it was seeking the allocation of
26 funding among the members. Further, the Company propounded a fourth data request on December 14, 2016
asking another iteration of this question. However, that fourth data request is NOT the subject of this Motion to
27 Compel and the Company has not held a personal consultation to discuss EFCA's response.

28 ² Rule 7.1(a) prohibits parties from slipping new requests for relief into their reply briefs. Replies "shall be
directed only to matters raised in the answering memorandum." Ariz.R.Civ.Proc 7.1(a). Arizona's Court of
Appeals confirms that a party "may not raise new issues for the first time in its reply brief." *Pima County v.*
INA/Oldfather 4.7 Acres Trust No. 2292, 145 Ariz. 179, 182, 700 P.2d 877, 880 (App. 1984).

1 **EFCA FULLY RESPONDED TO THE COMPANY’S DATA REQUEST 1.4**

2 Data Request 1.4(a) simply asked “Identify the senior level executives of EFCA”. This
3 data request does not ask EFCA to identify all of its decision-makers or to explain the role of any
4 specific person. The question is plain on its face and a straight-forward response was given: EFCA
5 has no senior level executives. This was stated clearly and concisely in the Response to the Motion
6 to Compel.³ To reiterate, EFCA is a member-managed limited liability company with no board of
7 directors or executives; the decisions are made by the members of EFCA.

8 And yet when the exact question asked was fully answered, the Company complains that
9 EFCA did not answer the questions the Company apparently intended, but failed, to ask. A Reply
10 to a Motion to Compel is not an appropriate vehicle for raising new issues and asking never before
11 asked questions. For these reasons, this portion of the Motion should be denied.

12 In Data Request 1.4(b), the Company asked who owns EFCA and in what percentages.
13 EFCA provided answers to those two requests. The Company does not dispute that those two
14 questions were answered. Instead the Company quibbles because it does not like the answers
15 provided and moreover, that answers to unasked questions were not provided. In its most blatant
16 maneuver yet, it asks the Commission to order EFCA to produce documents not previously sought
17 in this data request, not raised during the personal consultation, and not mentioned in the Motion
18 to Compel (and only mentioned for the first time in the Reply). The Company’s Motion with regard
19 to this data request should be denied as an abuse of this discovery process because the information
20 sought now was not previously sought.

21 **THE OBJECTION TO DATA REQUEST 1.5 IS WELL FOUNDED IN CONSTITUTIONAL LAW**

22 Data Request 1.5 asks a series of entirely irrelevant and harassing questions about EFCA
23 employees. In an effort to try to explain this serious of requests seeking information entirely
24 unrelated to its rate case, the Company argues in its Reply that knowing how many employees
25 EFCA has and who pays them ‘would be directly relevant to EFCA’s bias and SolarCity’s role.’⁴
26 EFCA has been transparent about its members, its purpose, and that it is funded by its members.

27
28 ³ It bears repeating that the Company did not raise this issue in the personal consultation; had it done so the same
 response would have been provided.

⁴ Reply, page 6 lines 12-13.

1 SolarCity is one of EFCA's members. All of its members' businesses are a matter of public record.
2 Harassing questions about the number of employees an intervenor has and who pays them are
3 irrelevant in a situation where the members are known to all and the source of funds has been
4 confirmed to be restricted to the members. It is important to note that EFCA counts no less than a
5 dozen membership organizations as intervenors in this matter, yet despite its stated desire to gain
6 a greater understanding of the way EFCA works, as of the date of this Sur-Response, ***the Company***
7 ***has propounded a sum total of zero data requests to all other intervenors.***

8 Setting aside just how entirely irrelevant this series of questions is to the task of setting just
9 and reasonable rates, the Company's argument for the compelled disclosure of this information
10 ignores the clear protections of First Amendment law. *Int'l Union v. Nat'l Right to Work Legal*
11 *Defense and Ed. Found., Inc.*, clearly states that the staff and employees of an organization are
12 protected by the First Amendment right of association., 590 F.2d 1139, 1147 (D.C. Cir. 1978). The
13 Company attempts to factually distinguish this case, but fails to argue that the holding and the
14 pronouncement that First Amendment protected right of association extends to the staff and
15 members of an organization. Similarly, courts have consistently found that information respecting
16 the identities of those associated with groups organized for the purpose of advocacy or speech fall
17 under the First Amendment privilege. *International Action Center v. United States*, 207 F.R.D. 1,
18 3-4 (D.D.C.2002). Curiously, the Company sets forth no case law holding that the employees and
19 members of an organization are **not** protected by the First Amendment right of association.

20 EFCA has met its burden of demonstrating that continued harassing and invasive discovery
21 by the Company, will harass, cause the withdrawal, or discourage new members. EFCA's
22 responses to the Company's data requests and its Response to the Motion to Compel is replete
23 with references to harassment of members. More importantly, Circuit courts throughout the nation
24 have "...repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of
25 association" *AFL-CIO v. FEC* 333 F.3d 168 (D.C.Cir 2003) and the compelled disclosure of
26 political associations can have a chilling effect on protected association. *Buckley v. Valeo*, 424
27 U.S. 1, 96 S.Ct. 612, 46 L.Ed. 659 (1976). Because compelled disclosure of protected association
28 has been held to chill protected association, EFCA has met its burden under *Perry v.*

1 *Schwarzenegger* and the burden shifts to the Company to demonstrate that the information sought
2 is rationally related to a compelling purpose. 591 F.3d 1126 (2009).

3 There is no justification for the information requested and this Request should be denied.

4 **COMMUNICATIONS BETWEEN EFCA AND ITS MEMBERS ABOUT THIS CASE ARE**
5 **PROTECTED**

6 EFCA's communications with its members, including SolarCity are not relevant and are
7 protected from disclosure by the attorney-client privilege, work-product privilege, First
8 Amendment associational rights, and the common interest doctrine. These are all valid objections
9 and are all timely raised. The Company cites no case law or commission rule that states that
10 objections to discovery, raised after the initial response are waived. The Company's only cited
11 case is inapposite and involves appellate court jurisdiction which says that issues not raised in the
12 trial court cannot be raised for the first time on appeal – clearly not applicable here.

13 To be clear, EFCA *did not state* it was an agent of SolarCity – instead it stated *the member*
14 *of EFCA are agents of EFCA*. Specifically, on page 6 lines 23-27, EFCA stated “The members
15 acting for the company are agents of the company. SolarCity is one of those members. The
16 members of EFCA (including SolarCity) are agents and representatives of EFCA and thus the
17 Company's request seeks communications between agents of EFCA and the principal (EFCA)”.
18 The Company's transposition of the relationship between EFCA and its agents is illogical and
19 when combined with all of the other changes and newly added arguments, appears to be a
20 conscious attempt to mislead the Commission on this issue.

21 The Company spends much time characterizing EFCA's responses as an unwillingness to
22 participate in discovery, when in reality, EFCA has largely responded to the questions asked and
23 it is the Company who seeks to change the questions and then argues EFCA failed to answer the
24 questions it failed to ask. The Company is pursuing a discovery strategy seemingly designed to
25 make intervenors pay dearly for questioning important proposals that the Company makes in its
26 rate case. EFCA has been on the receiving end of well more than 200 data requests from APS to
27 date while no other intervenor has received a single data request. For all of the reasons set forth
28 above, the Company's Motion should be denied.

1 Respectfully submitted this 30th day of December, 2016.

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3 /s/ Court S. Rich

4 Court S. Rich

5 Rose Law Group pc

6 Attorney for Energy Freedom Coalition of America
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1 **Original and 13 copies filed on**
2 **the 30th day of December, 2016 with:**

3 Docket Control
4 Arizona Corporation Commission
5 1200 W. Washington Street
6 Phoenix, Arizona 85007

7 *I hereby certify that I have this day served a copy of the foregoing document on all parties of*
8 *record in this proceeding by regular or electronic mail to:*

9 Janet Wagner
10 Arizona Corporation Commission
11 Legaldiv@azcc.gov
12 JXHatch-Miller@azcc.gov
13 mscott@azcc.gov
14 chanis@azcc.gov
15 wvancleve@azcc.gov
16 eabinah@azcc.gov
17 tford@azcc.gov
18 evanepps@azcc.gov
19 cfitzsimmons@azcc.gov
20 kchristine@azcc.gov

21 Anthony Wanger
22 Alan Kierman
23 IO DATA CENTERS, LLC
24 t@io.com
25 akierman@io.com

26 Meghan Grabel
27 OSBORN MALEDON, PA
28 mgrabel@omlaw.com
29 gyaquinto@arizonaic.org

30 Timothy Hogan
31 ACLPI
32 thogan@aclpi.org
33 ken.wilson@westernresources.org
34 schlegelj@aol.com
35 ezuckerman@swenergy.org
36 bbaatz@aceee.org
37 briana@votesolar.org
38 cosuala@earthjustice.org
39 dbender@earthjustice.org
40 cfitzgerrell@earthjustice.org

Daniel Pozefsky
RUCO
dpozefsky@azruco.gov

Patricia Ferre
pferreact@mac.com

Thomas Loquvam
Pinnacle West Capital Corp.
Thomas.loquvam@pinnaclewest.com

C. Webb Crockett
Patrick Black
FENNEMORE CRAIG, P.C.
wcrockett@fclaw.com
pblack@fclaw.com

Greg Eisert
Steven Puck
Sun City Homeowners Association
gregeisert@gmail.com
steven.puck@cox.net

Warren Woodward
w6345789@yahoo.com

Richard Gayer
rgayer@cox.net

Craig Marks
AURA
craig.marks@azbar.org
pat.quinn47474@gmail.com

1 Al Gervenack
2 Rob Robbins
3 Property Owners & Residents Assoc.
4 al.gervenack@porascw.org
5 rob.robbins@porascw.org
6 Cynthia Zwick
7 Kevin Hengehold
8 ACCA
9 czwick@azcaa.org
10 khengehold@azcaa.org
11 John William Moore, Jr.
12 Kroger
13 jmoore@mbmblaw.com
14 Jay Moyes
15 Moyes Sellers & Hendricks LTD
16 jasonmoyes@law-msh.com
17 jimoyes@law-msh.com
18 jim@harcuvar.com
19 Kurt Boehm
20 Jody Kyler Cohn
21 Boehm Kurtz & Lowry
22 kboehm@bkllawfirm.com
23 jkylercohn@bkllawfirm.com
24 Lawrence V. Robertson, Jr.
25 Noble Americas Energy Solutions LLC
26 tubaclawyer@aol.com
27 Michael Patten
28 Jason Gellman
Snell & Wilmer LLP
mpatten@swlaw.com
jgellman@swlaw.com
docket@swlaw.com
bcarroll@tep.com
Charles Wesselhoft
Pima County Attorney's Office
charles.wesselhoft@pcao.pima.gov

Tom Harris
AriSEIA
tom.harris@ariseia.org

Giancarlo Estrada
Kamper Estrada LLP
gestrada@lawphx.com

Greg Patterson
Munger Chadwick
greg@azcpa.org

Nicholas Enoch
Kaitlyn Redfield-Ortiz
Emily Tornabene
Lubin & Enoch PC
nick@lubinandenoch.com

Scott Wakefield
Hienton Curry, PLLC
swakefield@hclawgroup.com
mlougee@hclawgroup.com
stephen.chriss@wal-mart.com
greg.tillman@wal-mart.com
chris.hendrix@wal-mart.com

Albert H. Acken
Samuel L. Lofland
Ryley Carlock & Applewhite
ssweeney@rcalaw.com
aacken@rcalaw.com
slofland@rcalaw.com

Jeffrey J. Woner
K.R. Saline & Associates
jjw@krsaline.com

Thomas A. Jernigan
Ebony Payton
AFCEC/JA-ULFSC
thomas.jernigan.3@us.af.mil
ebony.payton.ctr@us.af.mil

John B. Coffman
john@johncoffman.net

1 Ann-Marie Anderson
2 Wright Welker & Pauole, PLC
3 aanderson@wwpfirm.com
4 aallen@wwpfirm.com

5 Steve Jennings
6 AARP Arizona
7 sjennings@aarp.org

8 Garry D. Hays
9 ASDA
10 ghays@lawgdh.com

11 Robert L. Pickels, Jr.
12 Sedona City Attorney's Office
13 rpickels@sedonaaz.gov

14 Jason Pistiner
15 Singer Pistiner PC
16 jp@singerpistiner.com
17 kfox@kfwlaw.com
18 kcrandall@eq-research.com

19 By: /s/ Hopi L. Slaughter
20
21
22
23
24
25
26
27
28

Thomas E. Stewart
Granite Creek Power & Gas LLC
Granite Creek Farms LLC
tom@gcfaz.com

Denis Fitzgibbons
Fitzgibbons Law Offices, PLC
denis@fitzgibbonslaw.com

Timothy J. Sabo
tsabo@swlaw.com
jhoward@swlaw.com
pwalker@conservamerica.org

Coash & Coash
1802 N. 7th St
Phoenix, AZ 85006
mh@coashandcoash.com